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No. 511

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, THE INTERNATIONAL ASSOCIATION OF MACHINISTS, and THE BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, *Appellants*,

v.

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF IN OPPOSITION TO THE MOTIONS TO AFFIRM

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In attempting to escape the scrutiny of this Court in this appeal, the Appellees have undertaken an extraordinary course of action which aggravates and compounds the errors already committed and confessed in this case by the United States. It is now all the more clear that this is truly a landmark case involving a runaway administrative process in which agencies of the United States are sub-

stituting their *ad hoc* will for the processes of law under the Constitution and statutes of the United States.

The Appellee, Interstate Commerce Commission [Commission] in its Motion to Affirm admits—even claims—at the very outset of its argument that the question of determination of public interest in authorization of control by one carrier over another "is a matter of regulatory policy peculiarly within the province of the Commission." (Commission Motion to Affirm, p. 7) Yet, having failed in the first instance to acquire the knowledge or to make the findings necessary to determine the public interest, the Appellees now reveal a secretly negotiated agreement and other extra-statutory steps that would effectively transfer the protection of the public interest from the Commission under statutory standards, to the care of sundry other parties under completely unknown standards and conditions.

I

The Paramount Question Presented is not Insubstantial Evidence to Support the Findings but a Dispute Over the Meaning and Scope of the Commission's Statutory Duty.

Appellees take similar tacks in trying to characterize this case as merely an every day argument over the substantiality of evidence to support the findings, and then proceed to try to impress this Court with the problems of reviewing a proceeding in which there are thousands of pages of record, hundreds of witnesses and a plethora of intervening parties. (Commission M. A. P. 8; B&O/C&O M. A. p. 3) This is not the great issue in this case.

Apart from the fact that certain of the findings do lack the support of substantial evidence, one of the paramount considerations here is a conflict over the meaning and extent

of the Interstate Commerce Commission's duty to determine "the effect upon the public interest of the inclusion, of failure to include, other railroads in the territory involved in the proposed transaction" as required by §5(2)(c)(2) of the Interstate Commerce Act before approving the control relationship of the B&O and the C&O.

A. *The Commision Erroneously Interprets its Statutory Duty as that of a Judge Rather than a Participant in the Administrative Process.*

The Commission interprets its duty as one merely of a judge to weigh whatever evidence the parties involved choose to offer. It rejects the role of a participant in the administrative process required by law to put into the Record evidence, essential to setting forth the public interest factors so that the Commission can hand down a proper decision fully considering those factors. The very reason for the creation of administrative agencies was to enable an agency to go beyond the role of a judge in cases like this and thereby properly protect the public interest. Commission herein rejects the very role and purpose which led to its creation.

Only New York Central Railroad (NYC) attempted to put in evidence as to the adverse effect upon it as a railroad and it withdrew before presenting any brief on its contentions. The Commission did not attempt to fill the void. For it considered its duty satisfied by the limits of whatever the record might contain. The Commission in its decision made its finding on this theory, for it said it was satisfied in that "No other carrier has asked to be included in the transaction and there is no evidence of record showing that the public interest requires the inclusion of any other carrier" (317 I. C. C. 261, 292).

So also the B&O-C&O Motion to Affirm emphasized this

theory of the Commission's statutory duty: "Since no other carrier claimed that a C&O-B&O affiliation would divert traffic from it, there was no evidence by any other carrier, no critical counter-study by C&O or B&O, and no occasion for the Commission as extensively to discuss what none of about 150 parties urged" (p. 11). Appellees fail to point out that those 150 parties they refer to presented narrow, limited evidence on personal interests and none attempted to or could perform the role the Statute imposes upon the Commission.

B. *The Commission's Narrow View of its Duty Violates the Controlling Statute.*

It is Appellant's contention that the impact on other railroads must be affirmatively found to satisfy the dictates of the Controlling Statute, and that contrary to what Respondents claim, the determination of this impact cannot be made to hinge and totally depend on what the parties who seek their own self-interest might unfold of interest to public concern here. Nor can opposing intervening parties like Appellants here be expected to have the capacity to develop such evidence. Private parties seeking long range self-interest may not find it of advantage to reveal present impact on their profits and loss of their service to the public. All of the railroad parties involved in "the territory" were before or during this proceeding involved in long range merger applications. They wanted like the C&O-B&O to agree among themselves, and then go to the Commission unopposed by other railroads and obtain ready approval under the Commission theory of not being obliged to go into the impact of these consolidations on other railroads beyond what the parties wanted to put in the Record.

C. The Commission Seeks a World of Non-Involvement through Procedural Discretion.

Consistent with this theory the Commission denied the request that it consolidate this record with the records made in the other proposed consolidations so it could determine the impact of the B&O-C&O joinder on these other railroads as consolidated units. It could never know this impact unless it did consolidate and this it refused to do. The Commission now claims that this refusal to consolidate was merely a procedural matter subject to their discretion (Commission M. A., p. 18, B&O-C&O M. A., p. 18). However, whatever the Commission's liking on the question, Congress did not make it a matter for discretion as to whether the Commission should discover and evaluate the impact of the proposed control relationship on other railroads. It explicitly ordered the Commission to discover impact. And this is not satisfied by an obdurate isolationism which confines all observation to what the parties may have the wit to volunteer in the immediate proceeding.

D. The United States, in Fact, Supports Appellants' Contentions.

The United States wholeheartedly attacked this failure of the Commission to make any effort to determine the impact on other railroads in the Court below. The United States Confession of Error appears at Appendix A. It filed lengthy briefs and advanced oral argument in the Court below in ardent support of this contention by Appellants. In its Brief before the District Court, the United States declared:

> "In our view, the law clearly required the Commission, before it approved the proposed acquisition by C&O

> of control of B&O, to ascertain and consider (1) the impact of the proposed C&O-B&O unification upon other railroads, (2) the relationship of the control acquisition to the pending merger proposals of other eastern railroads, and (3) the role of the proposed unification in shaping the industry structure which may emerge from these related plans." (p. 13)

And in its reply brief the United States again gave clear and uncompromising support to Appellants' contentions:

> "The Commission's brief suggests, we believe, that its failure to fully consider the impact of the C&O-B&O transaction upon eastern railroading rests in part upon a misapprehension of the scope of its own power" (p. 8)

E. *The Justice Department Now Attempts to Ride Two Horses.*

Now the Justice Department has assumed a remarkable position. In a Statement before the Commission and relied upon by Appellees here, it declares it continues to affirm that the Commission in violation of its clear statutory duty, failed to find the facts with respect to impact on other railroads; but on the other hand, it now states it has made a study in conjunction with a newly set up "Inter-Agency Committee" which has now decided, without hearings or presentation of evidence, that this control is ultimately in the public interest. [B&O-C&O M. A., p. 14]

This is astonishing. The Justice Department effectively is saying that its Inter-Agency Committee has paralleled the Commission's work and has come to the same conclusion. They purport to have set up a Super-ICC by executive order, which being free of the dictates of Congress,

can set itself apart from the Congressional criteria. However, it was Congress' intention that a control relationship may not be approved in the public interest until a study—presented as evidence in a public hearing—has determined its impact on other railroads in the territory involved. This the Commission has not done, and the Justice Department in spite of its extraparliamentary conclusions does not deny this or reverse the firm position on this matter it took before the District Court.

Here in its Memorandum to this Court, the Justice Department still reaffirms its position that the Commission did not find the impact in the public interest of this control on other railroads as required by statute. It then goes on to say that this control meeets the public interest. [Memorandum for the U. S., p. 2] This remains an inexplicable contradiction.

F. *The Commission Consigns Itself to Rocking Chair Regulation*

But an even more mysterious twist is added to the self-reversing position of the Justice Department. It has announced that it has taken upon itself to enter into a stipulation with the B&O and C&O to the effect that if any adverse impact on other railroads does occur, the Justice Department and the railroads are agreed to have the Commission put further conditions on their operation. Apart from whether it is possible for the Justice Department and these railroads to require the Commission to revise their findings from time to time in the indefinite future, this stipulation is an admission that they have absolutely no idea of what the impact would be from the record in this case. It is also a quite novel theory of regulation: Congress requires certain considerations to be set forth in the public interest in a hearing and on a record; but all of

this can be avoided and the control sought be set up immediately if only the parties stipulate that they are willing to be later bound by such conditions as the Commission might later decide to impose.

This is rocking chair regulation. It is an attempt to lock the barn door after the horse is stolen rather than impose the lock beforehand as Congress provided. It is contrary to the intention of Congress. Congress did not request that parties be willing to be regulated according to certain criteria. It ordered certain data to be developed and considered; it ordered that the public interest be found satisfied in these respects before a control relationship may be entered into, and it explicitly forbade control relationships until these conditions were met. Such regulation requires active, positive effort by the Commission. Congress did not sanction such "let them go at it, wait and see" rocking chair regulation. This stipulation is totally without legal effect and meaning, totally contrary to the regulatory scheme imposed by Congress, and remarkably audacious in its intent and purpose. It can hardly suffice as a future substitute for the Commission's duty to discover *now* the public interest factors in the impact on other railroads of the C&O control of the B&O.

G. *The Commission Tries to Fill a Total Void.*

To fill this complete void of any efforts to find impact on other railroads, Appellees have been stirred by these contentions to point to some casual statements of a few shippers denying any effect from this consolidation. However, the Commission in its Report and Decision never indicated that it even considered shipper testimony in this connection and the Commission cannot plead on appeal a basis for a decision it never heretofore declared. The only mention of reliance on shipper testimony occurs in a paragraph in relation to the effect on the New York Central:

"Equally untenable is the argument that shippers on Central's sidings would divert traffic to the C&O or B&O team tracks." [317 I. C. C. 261, 282]. At any event, these shippers were brought in by NYC and the C&O-B&O to oppose each other's contentions and were concerned essentially with effect on the NYC and not with other railroads, as Appellees try to suggest. [B&O-C&O M. A., p. 12; Commission, M. A. p. 11].

II. *The Commission Absolves Itself of all Responsibility for Approving Regionally Interrelated Merger Schemes.*

The Commission [M. A. p. 16] and the B&O-C&O [M. A. pp. 20-21] claim that Appellants are trying to make the Commision create master plans for railroad systems when Appellants urge that this Record be consolidated with the merger records of the other railroads in its territory.

They point to the fact that Congress long ago relieved the Commission of the duty to come forward with master plans. This is true—but it does not mean that Congress intended that consolidation of particular railroads should be accomplished without considering their effect on other railroads, and that the Commission should not have the power to approve or disapprove the railroad's own efforts towards systematic merger schemes. Congress never intended that the Commission should only look to the good of the particular railroads joined in a consolidation application, as Appellees contend. Congress explicitly gave the Commission a supervisory control of approval over interlocking consolidation proposals in §5(2)(c)(2) which requires a determination of the public interest on the impact of proposed consolidation "on other railroads in the territory involved." Appellees' arguments here are the usual efforts to construe Appellants' contentions to those

extremes that would lead to their rejection, and as such extremes Appellees' contentions warrant rejection here.

II

The Commission's Failure to Test Evidence in the Record on Key Issues of Fact Set Forth Solely By Self-Serving Parties of Similar Interest Cannot Be Dismissed as Insubstantial.

Appellants have contended that the Commission wrongly depended on unexamined, uncontested, self-serving statements of parties of similar interests on issues of fact which the Commission calls crucial to their decision. The Commision constantly resorts to the statements of B&O's great financial distress as the keystone for granting the control approval in the public interest, as a reason for its not stopping to discover the impact on other railroads and as a reason for rejecting consolidation of this record with those of the other pending mergers in this territory. [317 I. C. C., 261, 266]. Appellees' briefs do not face up to this issue.

A. Failure of the Commission to Validate Key Facts in Issue.

In Appellees' Motions to Affirm (Commission p. 9; B&O-C&O, p. 7), they admit the main motivating factor for approval of B&O control by C&O is B&O's alleged financial distress. The Commission in its Decision and Order cites the record that in the year of its hearing the B&O was losing $31 million and that B&O had a need for rehabilitation of close to $250 million which could not be funded by a company operating at such a loss. (317 I. C. C. 261, 265, et seq.) This key issue of fact was put forth only by the B&O and the C&O. No other party had the resources

to conduct an independent investigation, indeed if the railroads would have permitted it. Should these self-serving statements of the B&O's financial distress have been examined and evaluated, and contested? Would it have been a meaningless exercise? Two weeks after the Commission rendered its decision, the B&O and the C&O jointly announced an astonishing improvement in the B&O financial picture. They declared that for the financial year immediately after the one put in the record B&O suddenly turned from a net $31 million loss to a $1.6 million in net profits. Was this some isolated peculiarity which could be easily explained and which could not change this picture painted of such dire distress? Ever since that one great year of loss which they put in the record and on which the Commision so much depended, the profits of the B&O have been increasing more than one hundred per cent each year. On November 1, 1963, the B&O announced that their net income for 1963 "will rise to between $5 million and $6 million from $1,606,700 in 1962." [Washington Evening Star, November 1, 1963]. Then on November 18, 1963, the B&O announced that its net profit for 1964 would "at least double" that of 1963 and would approximate $10 million in total net profit. [Washington Evening Star, November 18, 1963]. This is now just eleven months after the Commission gave its decision "particularly in view of the poor financial conditions of the B&O." [317 I. C. C. 261, 265, 266]. Yet, when Appellants contended that the Commission should have sought aid of Commision Counsel to evaluate these key facts of financial distress which were untested in the administrative proceeding, the B&O and the C&O call this contention "frivolous" (B&O-C&O M. A., p. 21).

So also untested were the facts which the B&O and the C&O jointly put in as to the extent of need of B&O rehabilitations. So also untested were C&O's commitments to provide to the B&O such aid. So also undeveloped and

untested were any facts which would lend some basis to an understanding of what impact this control would have on other railroads. So also unpresented was the evidence which the New York Central put in on the impact of the B&O-C&O consolidation upon its own operation when it pulled out of the case without setting forth a brief opposing the B&O-C&O brief in summary and evaluation of opposing evidence.

B. *The Commision Delegates its Duty to Privately Interested Parties.*

Yet the Commission [M. A., p. 15] and the B&O-C&O [M. A., p. 22] charge this failure to Appellants on the theory that as intervenors we had a right to contest these facts and present opposing testimony and since we did not we cannot be heard to complain. In answer, the main point is not that on these important subjects Appellants did not have the power or resources to command counter-evidence, which it did not. What we contend is that having pursued the right to intervene in this proceeding in which the determinations of public interest adversely affects Appellants own interest, we have a right to insist that this determination of public interest shall only be that formulation of public interest which is properly and precisely determined in accordance with law.

The Commission has a duty to bring forth the facts required in the public interest and Appellants have a right to have the Commission perform this duty. The Commission's performance of its duty was never made by Congress to depend on what parties might plead. As intervenors who will be affected by the outcome, we have the right to have public interest determined fully and properly no matter to what extent we may participate in this determination. Congress imposed no duty on us, only a right to intervene to declare our interests. Upon the Commission, Congress

put an exacting duty to bring forth and to develop on the Record positively the considerations of public interest, and it may not rest secure merely because sixty-nine lawyers representing other interests have entered an appearance, as is suggested by Appellees. [B&O-C&O M. A., p. 22].

C. *Appellants Have a Right of Due Process to a Proceeding in Which the Commission Comes Forward With Evidence enabling it to Determine the Public Interest.*

When the determination of public interest is made to depend on no facts other than the point of fact that parties have neglected to bring forth relevant contentions or data, or made to depend on facts which are merely the uncontested, unsupported self-serving statements of the parties seeking approval, Appellants have been denied a fair hearing and due process of law guaranteed by the Fifth Amendment. Once we have the right to intervene, we have a right to have the Commission come forward with its own Counsel and fulfill its duty and properly determine this public interest on the Record according to its statutory duty. Serious determinations of public interest cannot be made to depend on the vagaries of private interests.

III

Conclusion

This case is the first major approval by the Commission of merger and control applications involving or affecting nearly all railroads in the eastern part of the United States. Railroads all over the Nation are in like circumstances of either being merger applicants or being about to become a party to such an application. If the Commission has a role to perform in deciding this flood of applications—other than to sit as a judge of evidence presented by anyone

who decides to be a party—now is the time to make that duty crystal clear.

Finally, contrary to Appellees' claims, *McLean Trucking* and the other cases they cite [Commission M. A., pp. 7-8] did not consider the Commission's statutory role and duty in a control case which is a part of a nation-wide railroad merger movement. This is a new and important question warranting this Court's review and judgment because of the effect of this case as a pattern upon the nation-wide merger movement now in full flood tide.

The Motions to Dismiss should be denied and plenary consideration be granted.

Respectfully submitted,

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EXHIBIT A

Confession of Error of the United States

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 23467

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ANSWER OF THE UNITED STATES OF AMERICA

The United States of America, a defendant in the above action, in answer to the complaint of the plaintiff, admits that the order of the Interstate Commerce Commission is erroneous, in that it is not supported by adequate findings upon substantial evidence with respect to the impact upon other railroads of the proposed acquisition by the Chesapeake & Ohio Railway Co. of control of the Baltimore & Ohio Railroad Co., and therefore fails to reflect the consideration required by Section 5 of the Interstate Commerce Act (49 U. S. C. 5) and the National Transportation Policy (49 U. S. C. preceding 1) to be given to the public interest in the effect of the proposed acquisition upon the structure of the railroad industry in the Eastern United States.

The United States neither admits nor denies any other allegations of the complaint. The United States takes no position on the ultimate question whether the proposed acquisition is consistent with the public interest. The United States favors, however, the earliest possible disposition of this matter, and, upon remand, the most expeditious consideration by the Commission.

WHEREFORE, this defendant prays that the order of the Commission be set aside and the case remanded to the Commission for further proceedings.

Respectfully submitted.

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